STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Martin M. Doctoroff, Kathleen Jansen and Hilda R. Gage

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

LINDA PETIT

Defendant-Appellant.
_____/

Supreme Court No. 119348

Court of Appeals No. 233294

Lower Court No. 98-10041-01

WAYNE COUNTY PROSECUTOR
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BRIEF ON APPEAL - APPELLANT
***ORAL ARGUMENTS REQUESTED ***

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Trial Court made no answer.

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Third Judicial Circuit Court by her plea of nolo contendere on March 2, 2000, and a Judgment of Sentence was entered on March 20, 2000. A Claim of Appeal was filed on June 21, 2000 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated March 22, 2000, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction over this appeal pursuant to Mich Const 1963, art 1, § 20 [as amended at the November 1994 general election] and as implemented by MCL 600.308(2)(d); MSA 27A.308, MCL 770.3(1)(e); MSA 28.1100, MCR 7.203(B)(5), MCR 7.205(D)(3). This Court granted leave to appeal on January 9, 2002.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant Linda Petit was charged with first-degree murder and felony firearm in the shooting death of her sister, Lou Brenda Jones. A plea agreement was entered whereby Ms. Petit would plead nolo contendere but mentally ill to second degree murder (as a second felony offender) and felony firearm and would be sentenced to 16 1/2 to 40 years, plus two years, in prison. (29a, 39-40a). The court used the investigator's report to establish a factual basis.

At sentencing, the prosecutor attempted to correct the judge's error in failing to establish a factual basis for the guilty but mentally ill plea by stipulating to the report by Dr. Kolito of the psychiatric clinic. Defense counsel agreed to the stipulation, and proceeded to allocate, stating that there were no corrections to the presentence report and asking that the judge consider Ms. Petit's history of severe mental problems. The daughter of the victim was then allowed to speak:

> "MS. JONES: Linda, why would you do this? You know mother raised me all by herself. And she made sure I went to school, and put clothes on back. And she had let you stay with us and she brought you furniture and food. I just want to say why would you do something like that?" (41a).

The court then asked whether anyone else in the victim's family wished to be heard, and the prosecutor responded in the negative. The court asked, "Anything further?" and defense counsel said, "No, Judge." (41a). The court proceeded to impose sentence, without referring to the guidelines and without stating any reasons for the sentence. At no point was Ms. Petit addressed or given an opportunity to speak on her own behalf.

Defendant was sentenced to 16 ½ to 40 years in prison for second-degree murder as an habitual offender, plus the mandatory two years for the felony firearm. (42a).

Defendant filed an application for delayed appeal in the Court of Appeals on March 19, 2001. The Court of Appeals issued an order dated April 27, 2001, denying the delayed application for "lack of merit in the grounds presented." However, Judge Jansen would have granted the motion for delayed application for leave to appeal.

On January 9, 2002, the Supreme Court issued an order granting leave to appeal, "limited to the question of whether the failure to afford the defendant an opportunity to allocute at sentencing is harmless error in light of the fact that the sentence to be imposed was a part of the guilty plea agreement." Justice Kelly would remand to the trial court for allocution and resentencing.

I. BECAUSE THE ANCIENT, ELEMENTARY, FUNDAMENTAL COMMON LAW RIGHT OF ALLOCUTION AT SENTENCING IS CRUCIAL NOT ONLY TO ALLOW THE DEFENDANT TO PLEAD FOR MERCY, BUT ALSO FOR THE IMPORTANT PURPOSES OF REDEMPTION, REHABILITATION, DETERRENCE, HEALING, FUNDAMENTAL FAIRNESS, AND THE APPEARANCE OF EQUITY, THE ERROR IN FAILING TO ALLOW THE DEFENDANT THE OPPORTUNITY TO SPEAK AT SENTENCING WAS NOT HARMLESS.

The question in this case is whether denying a defendant the right to allocute[1] at sentencing can ever be harmless error; in particular, whether it is harmless when there is a sentence agreement. As the Supreme Court of Michigan recognized in People v Berry, 409 Mich 774 (1990), the answer to this question is "no."

The **de novo** standard of review is applied in construing constitutional provisions, court rules and statutes. People v Houstina, 216 Mich App 70 (1996). Issues of law are reviewed **de novo**. People v Carpentier, 446 Mich 19, 60 n19 (1994).

In Berry, supra, there had been a sentence bargain for a specific term of years. In Long, a companion case, the trial court questioned the defendant about a variety of topics and even asked "[i]s there any reason why you should not be sentenced today." Nevertheless, the Supreme Court held that a resentencing was required because "the defendants were not separately and individually given a reasonable opportunity to address the court." Id., at 781. The Supreme Court stated:

> **"Nor should the nature of the right of allocution be viewed any differently in cases like defendant Berry's where a sentence bargain has been struck. Sentence bargain or no sentence bargain, the defendant must be given the opportunity to make a**

[1] The right to allocution is guaranteed by court rule: "At sentencing the court, complying on the record, **must**: . . . (C) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(D) (emphasis added); People v Berry, supra.

> **statement to the sentencing court** in mitigation, extenuation, or justification of the crime for which he is to be sentenced, or in any other respect relevant to the sentence to be imposed. He may wish to supplement or contradict material appearing in the presentence report, even if his attorney does not, or to bring the court's attention information theretofore undisclosed which could have a bearing upon the justice of the entire proceedings. Moreover, to enable the defendant to address the court before sentence is imposed is more than a harmless charity extended to one about to be imprisoned. It is an important and integral aspect of the truth-discovery purpose of the criminal justice process and is specifically mandated by our court rule." 409 Mich at 780-781.

The defendant's right of allocution has been strictly enforced ever since. [2] Defendant Petit submits that Berry should not be overruled and strict enforcement of the right of allocution should not be eliminated. The defendant's allocution is simply too important to the goals of sentencing and the appearance of justice.

The right to allocution is deeply rooted in the common law and Anglo-American jurisprudence. Behind this right are basic Judeo-Christian principles of atonement and salvation. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. Anonymous, 87 Eng Rep 175 (KB 1689); Green v United States, 365 US 301, 304; 81 SCt 653; 5 LEd2d 670 (1961); ABA Standards for Criminal Justice, Standard 18-6.4. The Court in Green emphasized that none of the increased protections afforded the criminal defendant lessens the need for the defendant, personally, to address the court prior to sentencing. Id. at 304. Justice Black described

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[2] See, e.g., People v Fralick, 402 Mich 950 (1978); People v Garavaglia, 400 Mich 807 (1977); People v Lowe, 172 Mich App 347 431 NW2d 257 (1988); People v McNeal, 150 Mich App 85; 389 NW2d 708 (1985) [allocution ineffective because sentence determined before allocution]; People v Mills, 145 Mich App 126; 377 NW2d 361 (1985) [allocution ineffective because probation department sentence recommendation not disclosed]; People v Morgan, 112 Mich App 90 314 NW2d 509 (1981). In People v Coles, 417 Mich 523, 532 339 NW2d 440 (1983) the Supreme Court reiterated, "Defendants are also guaranteed the right of allocution prior to being sentenced and must be resentenced if this right is violated."

allocution as a right "ancient in the law," which the defendant must be allowed to invoke just prior to sentencing. United States v Behrens, 375 US 162; 84 SCt 295; 11 LEd2d 224 (1963). Justice Harlan described allocution as an "elementary right," Id. at 167, embodied in Rule 32(a). Allocution is a right of "immemorial origin," McGautha v California, 402 US 183, 217; 91 SCt 1454; 28 LEd2d 711 (1971); ancient in law, it is both a rite and a right, United States v Pagan, 33 F3d 125 (CA 1, 1994). Thus, there is a long-standing basis for the right of allocution separate and independent of the entitlement created by Rule 32(a)[3] or its Michigan counterpart, MCR 6.425(D)(2).

Although the United States Supreme Court has stopped short of declaring the right of allocution a Constitutional right, several federal circuits as well as several state courts consider allocution a due process right. The Ninth Circuit Court of Appeals in Boardman v Estelle, 957 F2d 1523 (CA 9, 1992), held that "allocution is a right guaranteed by the due process clause of the Constitution" whenever a defendant requests to speak before sentencing. The Court noted that sentencing is a critical stage of the criminal process, Mempha v Rhay, 389 US 128; 88 SCt 254; 10 LEd2d 336 (1967), to which Constitutional due process guarantees apply. The defendant's right to testify in his own behalf is absolute and cannot be waived by anyone, including his attorney. Rock v Arkansas, 483 US 44; 107 SCt 2704; 97 LEd2d 37 (1987). For many, particularly those who plead guilty or nolo contendere, sentencing is the most critical stage of the criminal proceedings, People v Malkowski, 385 Mich 244 (1971), the forum in which they have the opportunity to explain their actions and express remorse. The right to testify at sentencing should be considered a fundamental, due process right. Indeed, the Fifth and

[3] Fed.R.Crim.P 32(a)(1)(C) provides, in pertinent part, that, prior to imposing a sentence, the judge shall "address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence."

Eleventh Circuits have held that a defendant's rights to be present and to allocute at sentencing are of Constitutional dimension.[4]

Moreover, several states have concluded that the right of allocution is guaranteed by the due process clause of their state constitutions. Presentence allocution has been recognized as a due process right under the Hawaii Constitution. State v Chow, 77 Hawaii 241; 883 P2d 663 (1994); State v Davia, 87 Hawaii 249; 953 P2d 1347 (1998). Alabama, Arizona, Oregon, Rhode Island, Washington, and Wyoming also recognize a right to allocution protected by both court rule and state constitution. Newton v State, 673 So2d 799 (Ala, 1995); State v Nelson, 122 Ariz 1; 592 P2d 1267 (1979); DeAngelo v Schiedler, 306 Ore 91, 757 P2d 1355 (1988); State v Brown, 528 A2d 1098 (RI 1987); In Re Powell, 117 Wash 2d 175, 814 P2d 635 (1991); Christy v State, 731 P2d 1204 (Wyo 1987).

Indeed, the right of allocution is so important that, the constitutional issue aside, numerous federal and state jurisdictions, including Michigan, require strict compliance and automatic reversal for failure to comply. United States v Pagan, supra; United States v Myers, 150 F3d (CA 5, 1998); United States v Barnes, 948 F2d 325 (CA 7, 1991); United States v Maldonado, 996 F2d 598 (CA 2, 1993); United States v Phillips, 936 F2d 1252 (CA 11, 1991); United States v Walker, 896 F2d 295 (CA 8, 1990); United States v Patterson, 128 F3d 1259 (CA 8, 1997); United States v Buckley, 847 F2d 991 (CA 1, 1988); United States v Navarro-Flores, 628 F2d 1178 (CA 9, 1980); State v Nelson, supra; Cline v State, 571 So2d 368 (Ala, 1990); Erickson v City and County of Denver, 179 Colo 412; 500 P2d 1183 (1972); Ventura v State, 741 So2d 1187 (Fla 1999); State v Davia, supra; State v Carey, 122 Idaho 382; 834 P2d 899 (1992); Kent v State, 287 MD 389, 412 A2d 1236 (1980); People v Berry, supra; People v

[4] United States v Moree, 926 F2d 654 (CA 5, 1991) (citing United States v Huff, 512 F2d 66, 71 (CA 5, 1975); United States v Jackson, 923 F2d 1494, 1496 (CA 11, 1991). But see United

Smith, 96 Mich App 346 (1980); City of Defiance v Cannon, 70 Ohio App 3d 821, 592 NE 884 (1990); State v Laird, 85 NJ Super 170; 204 A2d 220 (1964); Commonwealth v Anderson, 412 Pa Super 527, 603 A2d 1060 (1992); State v Crider, 78 Wash App 849, 899 P2d 24 (1995); State v Posey, 198 W Va 270, 480 SE2d 158 (1996). The United States Supreme Court has even emphasized that courts should strictly comply with the rule requiring allocution: "Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing."" Green, supra, 365 US at 305.

Strict compliance is supported by the important function of the deeply grounded common law right of allocution. The substantive reasons for giving the defendant the chance to speak in his behalf, besides the traditional plea for mercy and mitigation of sentence, demonstrate why it can never be harmless to deny this right to the accused. Again, the Judeo-Christian principles of atonement and salvation come into play. As one commentator explained the process of atonement:

> "Atonement is both a goal and a process. As a goal, atonement seeks the reconciliation of the wrongdoer and the victim, and the reintegration of the wrongdoer back into good standing as a member of the community. As a process, atonement has several steps whose successful completion should ideally lead to atonement-the-goal.
>
> . . . [T]he process of atonement has two basic stages: expiation and reconciliation. The first stage-- expiation--in turn has four steps: repentance, apology, reparation, and penance. A wrongdoer who successfully completes each of these four steps will have succeeded in expiating the guilt that taints him as a result of his wrongdoing, which means he has paid his debt and thereby regained his status as a member in good standing of the community. A wrongdoer who loses his good standing may regain it by assuming the status of the

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States v Fleming, 849 F2d 568 (CA 11, 1988).

penitent.

> The second and final stage in the process of atonement--reconciliation--lies not with the wrongdoer. It lies instead with the victim, since reconciliation requires the victim's forgiveness. Ideally, forgiveness will be forthcoming once the wrongdoer has completed the steps leading to expiation." Garvey, Stephen P., "Punishment as Atonement," 46 UCLA L Rev 1801 (1999).

Repentance, acceptance of responsibility, and a sincere expression of remorse are good for the defendant, the victims, the victims' family, and society as a whole. In fact, one of the primary purposes of allocution is the therapeutic and cathartic process of the accused offering an apology to the victims and, in some cases, to the community. Not only does this help the victim heal, remorse is a crucial factor in rehabilitation of the convicted person. The defendant's expression of remorse is used not only by the sentencing court, but also by the Department of Corrections in prisoner classification and parole consideration. For example, the parole board is to consider the prisoner's "[d]emonstrated willingness to accept responsibility for past behavior." R 791.7715(2)(d)(I). In Oakland County Prosecutor v Joel D. Pietrangelo, unpublished opinion (#222422, 4-21-00), the Court of Appeals reversed the circuit court's reversal of a Parole Board decision to grant parole to Mr. Pietrangelo. One of the principle factors considered by the Board was the defendant's acceptance of responsibility and his demonstration of remorse. (Op., p. 2).

Confession, remorse, atonement, and forgiveness are crucial components of the defendant's allocution. The importance of remorse is underscored in the federal sentencing guidelines, where section 3E1.1 provides a reduction in sentence to the defendant who "clearly demonstrates acceptance of responsibility for his offense." The Second Circuit Court of Appeals observed that "acceptance of responsibility necessitates candor and authentic remorse." United States v Cook, 992 F2d 1026 (CA 2, 1990). Remorse is an important factor in Michigan as well,

not only as a sentencing factor, **but also as a step toward rehabilitation.** [5] "[A] cceptance of responsibility is the first step in **rehabilitation.**" Jennings v State, 339 Md 675, 664 A2d 903, 908 (1995) (Emphasis added).

Moreover, it has been increasingly accepted that the perpetrator's expressions of remorse are healing for both the criminal and the victim. There are over one hundred victim-offender mediation (VOM) programs in the country, which stress forgiveness and reconciliation. PACT Institute of Justice, Victim-Offender Reconciliation & Mediation Program Directory (1993). It is believed that that VOM promotes both deterrence and rehabilitation. T. Crawford et al., Restorative Justice: Principals 6 (1990). Victoria E. Lawry, "Victim Offender Reconciliation Program in Polk County," Iowa Law Alert (1992). Victim-Offender Reconciliation Programs (VORP) are an important root of victim-offender mediation. VORP programs have as their first priority the relational aspects of crime. Attitudes, feelings and needs of both victims and offenders are taken very seriously. Healing of the victims and rehabilitation of the offender are the main goals. Where there is no victim-offender reconciliation program, the offender's expression of remorse at sentencing is even more important as a step toward healing and rehabilitation.

These principles are embodied in the criminal justice system, and are played out at the allocution stage. The Hawaii Court of Appeals in State v Chow, supra, cited the Michigan Court

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[5] Although it is improper to consider a defendant's failure to admit guilt if he has proclaimed his innocence and exercised his right to trial, the trial courts can and undoubtedly do consider remorse as a factor in sentencing. See People v Wesley, 428 Mich 708 (1987). Most states, in fact, consistently hold that sentencing judges may consider a defendant's expression of remorse. For example, in State v Baldwin, 304 NW2d 742 (Wis 1981), the Supreme Court of Wisconsin reasoned that a defendant's remorse, or lack thereof, is relevant to "his need for **rehabilitation**, and the extent to which the public might be endangered by his being at large." Similarly, in State v Sachs, 526 So2d 48 (Fla 1988), the Florida Supreme Court held that remorse is a valid factor to consider at sentencing.

of Appeals opinion of People v Smith, supra, in addressing the purposes served by allocution beyond that of sentence mitigation, including acknowledgement by the defendant of wrongdoing, rehabilitation, deterrence, the therapeutic effect on the defendant and the victims, and basic fairness:

> "For, even where mandatory sentences are meted out, a defendant's opportunity to speak may often be used to **acknowledge wrongful conduct, the first step towards satisfying the sentencing objective of rehabilitation**. A defendant's public acknowledgement of wrongdoing may also have collateral benefits. We would not minimize the effect it may have in some cases of **deterring others** from similar conduct, and **purging, to some extent, feelings of any felt need for retribution in a victim**, a victim's family, or the community as a whole.
>
> "Aside from its rehabilitative potential, allocution has a **therapeutic effect** on the defendant. . . . Indeed, some courts maintain that 'the right of allocution has survived more for its therapeutic effect on the defendant that its practical effect on the judge's determination.'. . . While we do not entirely agree with the contention, it has also been said that '[allocution's] major justification today is [its] therapeutic effect.' . . . But we do recognize that:
>
> > 'Standing convicted of a crime, the defendant should be accorded the right to speak regardless of whether it will actually affect the sentence ultimately imposed. While any statement the defendant may make might be 'meaningless' in terms of the sentence to be received, **we cannot say that the individual defendant would regard his or her remarks as meaningless**.' People v Smith, 96 Mich App 346 (1980).
>
> "Finally, we regard allocution to be a significant aspect of the fair treatment which should be accorded a defendant in the sentencing process. The American Bar Association states that 'the policies behind permitting the defendant to make a statement at sentencing have to do more with maximizing the perceived equity of the process than with detecting misinformation or obtaining a reliable impression of the defendant's character.' . . . We would disagree with the characterization that allocution is "perceived equity," however, because we believe **the defendant's opportunity to speak on his**

> **disposition is, as a matter of fact, essential to fair treatment.**" (Citations omitted, emphasis added).

The court concluded that the fact that a sentence may be a mandatory one does not render the denial of right of allocution harmless.

Several courts, in refusing to find harmless error in the failure to afford allocution to the defendant, have discussed the important, in fact irreplaceable process of the defendant facing the sentencing judge "man to man":

> "This Court has found the defendant's right of allocution so important that it requires it to be afforded even if the sentence to be imposed mandatory. Commonwealth v Melvin, 392 Pa.Super. 224, 572 A.2d 773 (1990). In Melvin, this Court enunciated the purpose of the right of allocution:
>
> '**[The right of allocution] is an opportunity for the defendant to face the court "man to man," without intermediaries or filtered exchanges. Such an opportunity is inherent and desirable in our form of individualized justice.** ...'" Commonwealth v Anderson, supra, at 530. (Emphasis added).

Similarly, the Maryland Court of Appeals observed:

> "[T]he allocutory process provides a unique opportunity for the defendant himself to face the sentencing body, without subjecting himself to cross-examination, and to explain in his own words the circumstances of the crime and his feelings regarding his conduct, culpability, and sentencing."
>
> "**[T]he practice in its present form serves a significant function no other device can completely replace.**" Harris v State, 306 Md 344, 509 A2d 120 (1986). (Emphasis added).

The Ohio Supreme Court called the right of allocution "more than an empty ritual" to which trial courts must "painstakingly adhere," State v Green, 90 Ohio St3d 352, 738 NE2d 1208 (2000), and the Superior Court of Pennsylvania recognized it as so important that the defendant need not show prejudice:

> "[A]llocution is such an important right that where the record confirms the petitioner was not afforded the right to speak prior to sentencing, relief is warranted notwithstanding the absence of any alleged prejudice arising from the denial of that right." Commonwealth v Thomas, 345 Pa Super 211, 497 A2d 1379 (1985).

Not only is justice served by affording the right of allocution, but also the appearance of equity. Again, as the Court observed in United States v Pagan, supra, citing United States v Barnes, supra, "allocution 'has value in terms of maximizing the perceived equity of the process.'" Even though the defendant in Pagan had engaged in a lengthy discussion of certain points at the sentencing hearing, the Court refused to dismiss the error in failure to provide allocution as harmless. In State v Nelson, 122 Ariz 1; 592 P2d 1267 (1979), the court held that the error was not made harmless simply because the substance of the defendant's statement was contained in the presentence report that the judge had considered. Holding that the defendant must be afforded his right of allocution even where the sentence is **mandatory**, the court in Ventura v State, supra, emphasized that "[r]especting the right of the defendant to address the court 'maximiz[es] the perceived equity of the process...'" The Fifth Circuit in United States v *Myers, 150 F3d 459, 465 (CA 5, 1998), discussed the importance of the function of allocution,* and recognized that it is essential even where it does not affect the length of the sentence:

> "The right of allocution . . . does not exist merely to give a convicted defendant one last-ditch opportunity to throw himself on the mercy of the court. To be sure, one important function of allocution is 'to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances.' . . . But the practice of allowing a defendant to speak before sentencing, which dates back as far as 1689 . . .has symbolic, in addition to functional aspects. As a sister Circuit has observed, '[a]ncient in the law, allocution is both a rite and a right. . . . The right of allocution, then, is one 'deeply embedded in our jurisprudence"; **both its longevity and its symbolic role in the sentencing process counsel against application of a harmless error analysis in the event of its denial.**

* * *

> "We recognize that our Circuit's rule will require the occasional 'vain and useless' act wherein a defendant is allowed, on remand, to speak in his own behalf, only to receive an identical sentence. We believe, however, that **the benefits gained from such an approach outweigh the costs** – costs which, we note in closing, can be avoided by vigilant compliance with Rule 32." (Emphasis added) (Citations omitted).

Fairness also dictates that the defendant be allowed to speak, sentence bargain or no sentence bargain, because the **victim** is guaranteed that right by statute. The victim's rights statute, MCLA 780.763, provides, in pertinent part:

> "The prosecuting attorney . . . shall give to the victim notice of the following:
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> * * *
>
> (f) The victim's right to make an impact statement at sentencing."

See People v Steele, 173 Mich App 502 (1988). MCL 780.764 provides:

> Sec. 14. The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant pursuant to section 14 of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.14. A victim's written statement shall upon the victim's request, be included in the presentence investigation report."

The court rule also gives the victim the right to speak at sentencing: "the court must give . . . the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(D)

There is no exception in the statute or court rule stating that the victim need not be consulted if there is a sentence agreement. The victim's right to allocution is absolute. Fundamental fairness demands that the defendant's right to speak on his behalf be absolute as

well. It is, after all, the defendant who has the more serious stake in the proceedings. Moreover, the trial court is even allowed to disregard the sentence agreement if the victim disagrees and urges the court to impose a more severe punishment. In People v Grove and Austin, 455 Mich 439 (1997), this Court held that the trial court had discretion to reject a plea agreement that included a prosecutorial sentence recommendation because the **victim** recommended prison time and the cap recommended by the prosecutor would not allow for prison time, and because of the disparity in what the victim said happened as opposed to what the defendant claimed.

In the instant case, the daughter of the victim was allowed to give an impassioned statement during the sentencing proceeding:

> "MS. JONES: Linda, why would you do this? You know mother raised me all by herself. And she made sure I went to school, and put clothes on back. And she had let you stay with us and she brought you furniture and food. I just want to say why would you do something like that?" (41a).

Failing to afford Defendant Petit the opportunity to respond to this person's accusations, to explain her actions, to express remorse, or to apologize to the victim's family cannot be considered harmless to either Ms. Petit, the family, or community observers in the courtroom. A sentencing proceeding at which the victim is allowed to speak but the defendant is denied that right is unthinkable; it reeks of unfairness and offends the ends of justice.

Of course, one of the primary reasons for allocution is to allow the defendant the opportunity to plead for mercy and to present mitigating circumstances which might affect the length of the sentence to be imposed. Even this purpose is not rendered meaningless in cases involving a sentence agreement. The defendant may be able to persuade the sentencing judge that a lesser sentence is appropriate. If the prosecutor agrees, the court is able, within its discretion, to depart below the sentence agreement. The agreement in the instant case was

certainly not at the low end of the guidelines, which recommended a minimum sentence of 8 to 25 years (96 to 300 months). In fact, Ms. Petit's 16 1/2-year minimum sentence was **double** the lowest guidelines recommendation.

The defendant may also be able to persuade the court to recommend certain conditions, placements, or treatments to accompany the agreed term of imprisonment or probation. At the very least, it is sometimes during allocution that mistakes or misunderstandings regarding the sentence agreement are revealed, which would otherwise be much more difficult to remedy.

Finally, continuing to strictly enforce the allocution requirement places no great burden on the judicial system. It is a very simple matter to ask the defendant if he or she has anything to say. In fact, it is routine. The cases where the sentencing judge forgets are rare. The prosecutor and defense attorney are present to remind the court. Even if allocution is overlooked, the remedy is a resentencing, not a retrial. As the court observed in State v Chow, supra:

> "The right is one easily administered by the trial court by the following inquiry: 'Do you, . . .[defendant's name], have anything to say before I pass sentence?' [citing Green v United States, supra.]
>
> "Once defendants are afforded a 'personal invitation to speak; under this procedure, no questions should arise in future cases as to silence, ambiguity, or waiver with respect to the right of allocution.
>
> • * *
>
> "The remedy for denial of Defendant's right of allocution is resentencing. . . . (it is well settled in all jurisdiction s that the remedy is resentencing and not retrial)." Id. at 248.

The court in State v Hoang, 94 Hawaii 271; 12 P3d 371 (2000), similarly stated, "it is time well spent indeed to inquire of the defendant directly, "Do you . . . have anything to say before I pass sentence?" The Seventh Circuit Court of Appeals emphasized that the importance of allocution far outweighs any inconvenience:

> "**The right of allocution is minimally invasive of the sentencing proceeding**; the requirement of providing the defendant a few moments of court time is slight. Because the sentencing decision is a weighty responsibility, **the defendant's right to be heard must never be reduced to a formality**. In an age of staggering crime rates and an overburdened justice system, courts must continue to be cautious to avoid the appearance of dispensing assembly-line justice." United States v Barnes, supra at 331. (Emphasis added).

Likewise, in concluding that the harmless error rule does not apply when a defendant has been denied the right of allocution, the Washington Court of Appeals emphasized that the burden in minimal and the process should be routine:

> "Offering a defendant the opportunity to address the court prior to passing sentence should be a rote exercise at every sentencing. It should be a mechanical act so routine as to require no thought. Applying harmless error in the face of a total failure of allocution prior to imposition of sentence would severely erode a right which the State concedes to be fundamental. . . . **Harmless error has no allure when the burden on a sentencing court in offering allocution is so minimal and the adverse effect on a defendant so potentially impactive**." State v Crider, supra at 30. (Emphasis added).

Considering the substantial reasons behind the ancient, elementary, fundamental common law right of allocution, including not only the plea for mercy but also redemption, rehabilitation, deterrence, healing, fundamental fairness, and the appearance of equity, the error in failing to allow the defendant the opportunity to speak at sentencing is never harmless. This Court should continue to require strict compliance.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **LINDA PETIT** asks that this Honorable Court, vacate her sentence and remand for resentencing.

Respectfully submitted,

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Dated: March 4, 2002

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Lower Court No. 98-10041-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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ERRATA SHEET FOR APPELLANT'S BRIEF ON APPEAL

Apendix Pages for Transcript Cites on Pages 1 and 14 listed as (41a) should read (42a)

Appendix Page for Transcript Cite on Page 1 listed as (42a) should read (43a)

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